

12-1-2006

Can Direct Democracy Be Made Deliberative

Ethan J. Leib

University of California—Hastings College of the Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Election Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Ethan J. Leib, *Can Direct Democracy Be Made Deliberative*, 54 Buff. L. Rev. 903 (2006).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol54/iss3/12>

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Can Direct Democracy Be Made Deliberative?

ETHAN J. LEIB†

INTRODUCTION

Every election cycle a great number of citizens take to the polls to vote on public policy matters directly. Direct democracy has problems. And an account of deliberative democracy—far from being a source to critique direct democracy—might provide a solution.

I have three goals here. First, I hope to identify some problems with the mechanisms of direct democracy that most states and many cities throughout the country employ: the initiative and the referendum. Next, I will offer a potential solution to these institutional problems using aspects of the theory of deliberative democracy, a theory often marshaled to undermine direct democracy. Finally, I will spell out why this design project should be of especial interest to lawyers.

Before I turn to my discussion of direct democracy, let me offer a working definition of deliberative democracy. Deliberative democracy is a theoretical account of proper democratic decision-making. It holds that the legitimacy of decisions can be increased if such decisions are preceded by authentic deliberation.¹ What is authentic deliberation? It is deliberation that is as free as possible from the distortions of unequal power and big money.² There are

† Assistant Professor of Law, University of California–Hastings College of the Law. Visiting Professor of Law, Brooklyn Law School (Fall 2006). J.D., Ph.D. (Political Science), M.A., B.A., Yale University; M. Phil., University of Cambridge. I thank Eli Mark for research assistance and the participants in faculty workshops at Hastings and SUNY–Buffalo for comments.

1. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 72-73 (James Bohman & William Rehg eds., 1997).

2. See *id.*

many versions of deliberative democracy, but at their core they all share a commitment to deliberation over ways of measuring preferences that are not preceded by deliberation.³ Deliberation is held to be valuable because it contributes to the legitimacy of the democratic decision ultimately made.

Most people are generally familiar with the practices of direct democracy. American direct democracy exists in twenty-seven states in the form of the referendum and the initiative.⁴ We will have to leave recall to one side; it is an anomaly in any case, existing in no more than eighteen states.⁵ The referendum is a mechanism that enables legislatures to have citizens ratify or reject a statute or state constitutional amendment;⁶ the initiative, by contrast, allows citizens to get a ballot measure before the populace directly.⁷ Initiatives and referenda can address relatively mundane issues like the management of noxious weeds in

3. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685 (2004) (reviewing RICHARD A. POSNER, *supra*). See generally AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004).

4. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1587-89 (1990); see also Initiative & Referendum Institute, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Aug. 6, 2006) (providing a breakdown of the twenty-seven states that permit initiatives or referenda or both). As of a few years ago, more than two-thirds of the population lived in either a city or state with the initiative—and most indications show that this number will only grow. See JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* 1, 8 (2004).

5. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 125-56 (1999); see also NAT'L CONFERENCE OF STATE LEGISLATURES, *RECALL OF STATE OFFICIALS* (March 21, 2006), <http://www.ncsl.org/programs/legman/elect/recallprovision.htm> (summarizing recall provisions for statewide and legislative officers in eighteen states that have the recall). Some recent helpful reflections on the recall can be found in Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239 (2004), and Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927 (2004).

6. See Eule, *supra* note 4 at 1510-12.

7. See *id.* at 1511. Initiatives can be statutory or constitutional—and they can be “direct” or “indirect.” “Indirect” initiatives (allowed by a relatively small number of states) enable voters to refer a proposition to the legislature; depending on legislative reaction and state-by-state rules, the voters may ultimately decide on the fate of the proposition in a direct election. For the most part, I focus here on “direct” initiatives.

Montana;⁸ yet they can also address some of the most contentious legal issues of our time: affirmative action,⁹ physician-assisted suicide,¹⁰ and gay marriage.¹¹

Lurking behind these mechanisms is a recognition that our representative democracy is often too remote from the people. Legislators routinely have perverse incentives in their law-making activities and they are notoriously constrained by the need to finance their campaigns and pander to the wealthy and powerful. Direct democracy can serve as a check upon them. Additionally, direct democracy is a way to acknowledge the extreme coercive force of the state and give citizens a direct say in their government. Popular sovereignty, as an aspiration, holds that each citizen should be the author of his or her own laws in some real, concrete way.¹² This is a republican conception of freedom that remains uncomfortable with tacit consent, a concept usually used to justify the social contract. We no longer abide by a definition of republicanism that excludes direct democracy in favor of representation: most states and many cities have embraced direct democracy and the Supreme Court, in 1912, refused to rule direct democracy unconstitutional under the Republican Form of Government Clause in Article 4, Section 4 in a case called *Pacific*

8. See MONT. CONST. art. IX, § 6, *added by* MONT. CONST. amend. 40 (2004).

9. The most public affirmative action initiative was California's Proposition 209, which prohibited affirmative action in public contracting, hiring, and education. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997) (upholding the constitutionality of Proposition 209).

10. In 1994, Oregon became the first state to legalize assisted suicide when voters approved a ballot measure enacting the Oregon Death With Dignity Act, which survived a 1997 ballot measure seeking its repeal. See *Gonzales v. Oregon*, 126 S.Ct. 904, 911 (2006). In 1998, Michigan, the home state of Dr. Jack Kevorkian, also had an initiative placed on the ballot by its voters to allow physician-assisted suicide, but it did not pass. See *Assisted Suicide Law Fails in Michigan*, ST. LOUIS POST-DISPATCH, Nov. 4, 1998, at A7.

11. Recently there have been a plethora of initiatives attempting to ban gay marriage, which have overwhelmingly been approved by the electorate. In 2004, for instance, voters from eleven states passed gay marriage bans. See BALLOT INITIATIVE STRATEGY CTR., 2004 ELECTION RESULTS: BALLOT INITIATIVE & REFERENDUM 5 (2004), <http://ballot.org> (follow "On the Ballot" hyperlink; then follow "Election Results" hyperlink; then follow "Election Results 2004" hyperlink; then follow "2004 Ballot Initiative & Referenda Results" hyperlink).

12. See Frank I. Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 147 (James Bohman & William Rehg eds., 1997).

States.¹³ Republicanism is ultimately rooted in popular sovereignty, the right to author our own laws and actively participate in our governance. In the final analysis, as a society, we are mostly committed to what the University of Southern California's Beth Garrett has called "hybrid democracy"—democracy that is *both* representative and direct.¹⁴

I. THE PATHOLOGIES OF DIRECT DEMOCRACY

Direct democracy, even when it is embedded in a larger system of representative government, is nevertheless defective in at least four different ways, some of which are of particular concern to deliberative democrats.

First, direct democracy, as currently designed, is extremely susceptible to having those with access to substantial amounts of money controlling the terms of debate.¹⁵ Money influences every stage of direct democracy:

13. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149-51 (1912) (holding that challenges to direct democracy based on the Guarantee Clause present non-justiciable political questions). For recent research on the Guarantee Clause, see Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143 (2002); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 814-15 (2002) (concluding that the framers were not opposed to direct democracy). Cf. Catherine A. Rogers & David L. Faigman, "And to the Republic for Which It Stands": *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1059 (1996) (arguing that direct democracy is unconstitutional under the Guarantee Clause).

14. See Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1130 (2005) (noting that more than three-quarters of Americans live under a hybrid democracy, which is a form of government that incorporates both representative and direct democracy as essential elements of law making). In a nice observation about the dynamics of hybrid democracy, Garrett notes that legislators, parties, and special interests also conversely use the power of direct democracy to influence candidate elections. See generally Elizabeth Garrett, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985 (2005) (describing the interplay between initiatives and voter turnout in candidate elections in a hybrid democracy).

15. For discussion of the pervasive role of money in direct democracy, see generally DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000), ELISABETH GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999), and Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and*

it can get things on the ballot by paying signature gatherers;¹⁶ it runs large-scale media campaigns that can be calculated to confuse voters;¹⁷ and it reduces important policy discussions to sound-bytes—often misleading ones.¹⁸ Even when initiative drives are supported by arguably benevolent philanthropists like George Soros, rather than trade associations looking to maximize their profits, the influence of money is pervasive.¹⁹ Although it is widely known that it is much harder to buy a “yes” on an initiative from voters than it is to buy a “no,” even getting a proposal on the ballot can give an issue salience it did not have previously—and can effect the treatment of that issue in the legislature. In any case, the fact that a substantial sum of money is better at thwarting an initiative than it is at buying a policy enactment is cold comfort to those interested in using the initiative to enact the preferences of the voters without being skewed by purchasing power.

Referendum Process: Evidence of its Effects and Prospects for Reform, in *THE BATTLE OVER CITIZEN LAWMAKING* 73 (M. Dane Waters ed., 2001).

16. Because of the large number of signatures frequently required to get an initiative on the ballot, signature gatherers are paid. See BRODER, *supra* note 15, at 52-69 (describing the signature gathering business). This can skew the topics of initiatives from benevolent proposals to those catering to special interests. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 35 (1995) (“Absent from the initiative agenda are issues of concern to the poor, the less educated, and those who lack political organization or financial resources. Instead, issues tend to reflect the concerns of ideological or reform groups that have been unsuccessful in getting their way with the legislature . . .”). Nonetheless, it is unconstitutional to prohibit payment to signature gatherers. See *Meyer v. Grant*, 486 U.S. 414, 425-27 (1988). However, recently a ban on paying signature gatherers per signature, but not banning payment in other fashions, e.g., on a salary, was upheld. See *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006) (upholding ban based on government interest of combating signature fraud).

17. See BRODER, *supra* note 15, at 52 (“Prop. 13 and its progeny have spawned a huge industry devoted to the manipulation of public opinion.”).

18. See, e.g., *id.* at 79 (detailing the misleading but effective advertisements regarding Missouri’s initiatives concerning riverboat gambling).

19. Although George Soros and fellow financiers spent several million dollars on drug reform initiatives in spending mismatches, see Michael M. O’Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 293, 295-96 (2003), those figures seem almost nominal when compared with an initiative that pitted the insurance industry against trial lawyers that brought out \$60 million in spending.

Second, statutes put to the general population for consideration are routinely drafted in ways that citizens cannot understand—sometimes benignly, sometimes subversively.²⁰ I recently had to abstain from an initiative in San Francisco²¹ because I could not comprehend what the effect of my vote would be: Did I want to allocate \$246 million to improve conditions at City College of San Francisco? I had no idea what the potential alternative allocations were.

Not only are some ballot measures simply incomprehensible or wrenched from their context, but they are also often drawn to confuse voters into voting “incorrectly”—in a manner at odds with their preferences.²² Some states have attempted to address drafting problems

20. See DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 118-19, 138-43 (1984) (finding that understanding typical ballot measures in some states required a reading comprehension level equal to that of a third-year college student, and in many cases that of a student with multiple years of postgraduate education, causing the vast majority of voters to not understand the meaning of proposed legislation); see also PHILIP L. DUBOIS & FLOYD F. FEENEY, *IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE* 121-22 (1992) (discussing voter confusion and data concerning voters who vote contrary to their preferred outcome).

One of the benign reasons for the difficulty in comprehension is the lack of procedural hurdles to make a poorly drafted initiative clear before it is presented to the voters. See Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 78 (1995) (noting that initiatives are generally more poorly drafted than legislation because “[l]ess expertise is brought to bear, and a small group of proponents will overlook unintended effects and ambiguities more often than will the broad range of interest present in the legislative process.”). However, there are many less benign reasons, where legally significant details are buried in lengthy or complex measures. See DUBOIS & FEENEY, *supra*, at 113-14 (discussing “Trojan horse” provisions).

21. San Francisco City & County, Proposition A (Nov. 8, 2005 Election), available at http://www.sfgov.org/site/uploadedfiles/election/Candidates_Campaigns/Lgal.txtPropA.pdf.

22. Frequently initiative organizers attempt to manipulate the vote through ambiguous or complex drafting. See Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretative Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 129 (1995). In California, for instance, Proposition 188, a product of the tobacco lobby, was touted as establishing tough standardized statewide smoking restrictions, but also had the effect of preempting tougher local ordinances. See Robert Pear, *Debate on Whose Voice Is Heard in Initiatives*, N.Y. TIMES, Nov. 7, 1994, at B11.

by limiting initiatives to a single subject;²³ however, the “single subject rule” can be incredibly ineffective.²⁴ Incorrect voting can be measured relatively well if you ask voters in plain English right before voting on a ballot measure what they think and compare that expressed preference with how they say they actually voted. Empirical studies show that the effects of incorrect voting are substantial insofar as it happens to more than just an insignificant proportion of voters.²⁵ They are robust insofar as it happens across issue areas—in property tax issues and affirmative action alike.²⁶ And they can even be decisive: incorrect votes have sometimes ratified a result seemingly not actually favored by the majority of voters.²⁷

Third, empirical evidence also reveals that those who vote in ballot measure elections are older, more educated,

23. See Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 954 (1983) (noting that a series of extraordinarily diverse initiatives prompted California to adopt its single subject rule). However, Lowenstein argues that the purposes of the single-subject rule, including avoidance of complexity and avoidance of logrolling, are not well served by it. See *id.* at 963.

24. See, e.g., Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 467 (1998) (noting that single subject requirements “have proven extremely difficult to enforce meaningfully or consistently”). In *Fair Political Practices Comm’n v. Superior Court*, 599 P.2d 46, 50 (Cal. 1979), for instance, the court upheld the Political Reform Act of 1974 against a single subject rule attack even though it contained no less than eight complex features. *Id.* The court accepted the fact that complex problems required complex solutions which could cause confusion, observing that “[u]nless we are to repudiate or cripple use of the initiative, risk of confusion must be borne.” *Id.* Although this led to “the possibility that some voters might vote for the measure . . . while objecting to some parts,” this was an unavoidable risk which did not warrant rejection of the loose standards of California’s single-subject rule. *Id.* But see Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35 (2002) (describing several states’ recent trend towards relatively strict enforcement of the single subject rule).

25. See BRODER, *supra* note 15, at 179 (noting that, in Washington, polls showed a twenty-five point change in the margin of support for an anti-affirmative action proposal when voters were told the second time they were polled that the proposal would “effectively end affirmative action”).

26. See *id.* at 46 (property taxes); *id.* at 179 (affirmative action).

27. See *id.* at 88 (noting that, in Massachusetts, a recycling effort was defeated by a campaign that called the initiative a “repackaging” effort); *id.* at 181 (affirmative action).

richer, and more ideological than the general population.²⁸ Without a representative group involved in policy determination, a further cloud of suspicion is cast over direct democracy. If part of the rationale for direct democracy is that our representative institutions are failing in actually representing the citizenry and its interests, it is a serious problem that voters in direct democracy do not fare much better on the representativeness scale. Although some have argued that generally voter preferences do not differ from nonvoter preferences, it remains true that the rate of voting for measures of direct democracy is even lower than it is in general elections.

Finally—and more specifically from the perspective of *deliberative* democracy—substantial empirical evidence shows that people change their minds about many policy matters when they have had an opportunity to reflect on an issue by reading material about the issue and discussing it with their fellow citizens and policy experts. Experiments by James Fishkin have proven the point time and again: after deliberations, citizens routinely alter their preferences in durable and unpredictable ways.²⁹ Fishkin gathers a random sample of citizens together over a weekend and provides them with balanced briefing materials about an issue. Over the weekend, each citizen has an opportunity to discuss the issue with fellow citizens in small jury-like settings and with politicians and stakeholder groups in larger sessions. People trained in facilitation moderate the groups. Throughout the weekend, Fishkin measures citizen preference—and shows nearly every time that preferences

28. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 32 (1995) (noting those who turn out for ballot initiatives are "better educated, older, better off, and more ideological than voters in general elections."); MAGLEBY, *supra* note 20, at 108-10 (discussing the fact that poorer citizens are less likely to come to the polls and less likely to vote on propositions, while wealthier constituents have a "double advantage" because they are more likely to come to the polls and more likely to vote on propositions). Also, more educated and affluent voters read ballot materials at higher rates. See CAL. COMM'N ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 247 (1992).

29. See generally JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1997); James S. Fishkin & Robert C. Luskin, *Bringing Deliberation to the Democratic Dialogue*, in *A POLL WITH A HUMAN FACE: THE NATIONAL ISSUES CONVENTION EXPERIMENT IN POLITICAL COMMUNICATION* (Maxwell McCombs & Amy Reynolds eds., 1999).

change. He has now done this more than twenty times—in many different countries and on many different issues, including crime, child care, and foreign policy.³⁰ Given this reality, direct democracy's reliance on "naked" preferences is potentially troublesome because it makes little effort to educate citizens on the issues upon which they are voting and gives them no well-suited forum to deliberate about those issues. Although one can reasonably question Fishkin about whether it is the briefing materials or the deliberations themselves that cause the changes in preferences,³¹ there can be no quarrel that the institution as a whole produces preferences that are better considered by participants.

II. CAN DELIBERATIVE DEMOCRACY OFFER A SOLUTION?

With these pathologies in view (among others),³² many deliberative democrats simply give up on direct democracy. As Larry Sager wrote in the *Harvard Law Review*, "[l]egislation by plebiscite is not and cannot be a deliberative process."³³ He and other deliberative democrats simply use the theory of *deliberative* democracy to reject *direct* democracy.³⁴ From my point of view, however,

30. See JAMES S. FISHKIN, DELIBERATIVE POLLING®: TOWARD A BETTER-INFORMED DEMOCRACY, <http://cdd.stanford.edu/polls/docs/summary/> (last visited Aug. 7, 2006) (executive summary of deliberative polling results from 1994-2002); James S. Fishkin, *The Nation in a Room: Turning Public Opinion into Policy*, BOSTON REV. Mar./Apr. 2006, at 10, available at <http://bostonreview.net/BR31.2/fishkin.html>.

31. For this challenge, see DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY 60 (2006).

32. Additional potentially troublesome pathologies of direct democracy include its inability to gauge preference intensity and its incapacity to allow bargaining for compromise. See *infra* notes 38-40 and accompanying text. See Clark, *supra* note 24, at 456 (describing the problems of preference-intensity); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 182 (1977-1978) ("[T]he coalition process does not work in the unwieldy and irregular referendum forum; one just wins and loses and that is all.").

33. Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Saldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1414 (1978).

34. Many political liberals and proceduralists fall in this camp, since they look to the courts to tell us what we would think under the right conditions and using the best procedures. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

deliberative democracy offers a potential blueprint that can help us devise a better way to undertake direct democracy.

A. *Some Theoretical Groundwork*

Before we can engage in institutional design, I need to get a bit clearer on the version of deliberative democracy I embrace: the details of the theory have ramifications for the design project. Without getting too distracted by the ever-expanding literature of deliberative democratic theory, let me chart some coordinates on the terrain and where I locate my approach.

First, there are some deliberative democrats who are elitists and some who are populists. The elitists principally urge for deliberation among elites (judges, legislators, interest groups).³⁵ Populists, by contrast, believe that the benefits deliberation offers must be pursued through popular institutions and that deliberation must take place, first and foremost, between lay citizens.³⁶ I lean towards the populists: the legitimacy deliberation can confer accrues more easily when it is pursued among lay citizens; elite deliberation is also important, to be sure, but it still keeps citizens at too far a remove and is very hard to police.³⁷

A second dimension: there are those who see deliberation as the *only* source of legitimacy and seek to encourage it everywhere.³⁸ Others recognize that all decision-making has to be non-deliberative in some way and

The elitist version of deliberative democracy receives a definitive justification from John Stuart Mill. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 307-08 (Geraint Williams ed., Orion Publ'g Group 1993) (1861) ("Every one has a right to feel insulted by being made a nobody, and stamped as of no account at all. No one but a fool . . . feels offended by the acknowledgment that there are others whose opinion, and even whose wish, is entitled to a greater amount of consideration than his.").

35. See, e.g., RAWLS, *supra* note 34; AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996).

36. See, e.g., Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313 (2002).

37. See ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 35-40 (2004).

38. See, e.g., Bernard Manin, *On Legitimacy and Political Deliberation*, in NEW FRENCH THOUGHT: POLITICAL PHILOSOPHY 186-200 (Mark Lilla ed., 1994).

that deliberation can only be *one* source of legitimacy.³⁹ We *vote* to create law and that need not always be a deliberative process—sometimes bargaining is necessary. Moreover, there are basic rights that need to be preserved against majorities without always being subject to deliberation. Finally, there are problems that popular citizen deliberation is not especially well-suited to solve—deeply felt religious disagreements and complex tax law may be good examples, though surely more deliberation is warranted to decide which subjects must remain off the proverbial table.⁴⁰

This realization, that deliberation cannot do everything, is what leads me to emphasize the separation of powers in my conception of deliberative democracy.⁴¹ Different branches of government do different things—and not all can be deliberative all the time. A pragmatic deliberative democracy like mine recommends focusing on achieving deliberation in special institutions where it can function especially well. But this pragmatism has principle too: the most stable, rights-enhancing regimes are actually mixed ones, ones that combine many different modes of decision-making in the same polity.⁴² You need to protect everyone's freedom and equality before they can come together as free and equal to deliberate fruitfully.

Another dimension upon which deliberative democrats can be divided is the choice about whether deliberative institutions should be designed to form a public *will* or merely to distill a better public *opinion*. Most believe that

39. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Pildes, *supra* note 3, at 686 (2004).

40. See Schacter, *supra* note 22, at 164 (asserting that initiatives are not well suited for detailed, technical laws); DUBOIS & FEENEY, *supra* note 20, at 24-28 (noting that in Massachusetts, the initiative may not be used for measures relating to religion, and in Alaska, Massachusetts, and Wyoming, the initiative may not be used for measures affecting the courts). *But see* MATSUSAKA, *supra* note 4, at 71 (arguing that citizens on average track their own fiscal preferences relatively well through the initiative).

41. See Ethan J. Leib, *Pragmatism in Designing Popular Deliberative Institutions in the United States and China*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* 113, 121 (Ethan J. Leib & Baogang He eds., 2006).

42. This is a rather different pragmatism than that of Posner. See POSNER, *supra* note 3. He thinks pragmatism endorses democratic minimalism; I think pragmatism enables us to see that deliberative institutions, when properly designed, can helpfully supplement more minimalist democratic practices.

striving for deliberation in the context of opinion-formation is sufficient.⁴³ Fishkin's deliberative polls, for example, give us a better distillation of informed public opinion. But I emphasize the importance of having deliberative institutions that are given the task of making binding law—forming a public will. It focuses deliberators on the practical task at hand (deliberation should be about doing something)—and it empowers them.

Finally, there is the question about whether citizens should be *made* to deliberate. Although conscription is a hard case to make, the vast majority of democrats happily endure our mandatory jury system, the institution that de Tocqueville praised in superlatives and suggested gave America its true democratic character.⁴⁴ A survey of jury studies would bear out the claim that citizens can fruitfully deliberate under the condition of coercion.⁴⁵ Virtually every element of our participatory democracy is affected by what social scientists call a voluntary response problem: the exclusion of those that select themselves out for a variety of reasons.⁴⁶ We should avoid it if possible.

B. *The Practical Design Idea: A Popular Branch*

Employing this practically-oriented theory, I have designed what I call the "popular branch of government" to embody a joint commitment to direct democracy, popular sovereignty, and deliberation. It is an institution targeted to replace our current mechanisms of direct democracy, and designed to entrust lay citizens to make policy decisions, only after they have an opportunity to really think an issue through. This model of decision-making can be conceptualized as a branch, subject to checks and balances and the separation of powers. I think I can show how this "popular branch" helps us avoid the pathologies I outlined above. Let me share with you some of the skeletal

43. See, e.g., BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004).

44. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273-75 (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

45. See LEIB, *supra* note 37, at 91 n.8.

46. See, e.g., MAGLEBY, *supra* note 20, at 108-10 (discussing the voluntary response problem in voter turnout).

mechanics of how it might work in a given government, which might function on the state, local, or even federal level.⁴⁷

Instead of having a ballot measure put before the entire populace for adjudication, imagine instead a stratified random sample of eligible voters convened for the purpose of settling a policy question. They would be compensated but would be required to serve to avoid the voluntary response problem. Imagine 535 of them, the size of the U.S. Congress, brought together to deliberate with one another in small jury-like groups lead by carefully trained moderators—perhaps judges—before voting on the matter themselves. The moderators would help ensure civility, settle factual matters, and encourage everyone to speak their mind. Only these diverse citizens, the ones given the opportunity to deliberate, would be able to vote on the initiative or referendum, but their votes would be binding law. Unlike forums such as the town hall meeting where people rarely influence policy, or the sort of participatory institutions the Progressives created in the early twentieth century to educate the masses,⁴⁸ my institution is designed to make legitimate law.

A transcript of the deliberations would ultimately be made public (though attributed to deliberators anonymously) and questionnaires targeted to measure the deliberators' thoughts would be administered throughout the few days of deliberations. The transcripts are necessary to police the moderators. But the record would also furnish more information about citizen preferences. Very few policies can implement themselves—legislators have been shown to have substantial control over how and whether to give effect to laws enacted through the mechanisms of direct democracy.⁴⁹ The record, then, can serve as a resource for information in designing implementation

47. For my complete proposal, see LEIB, *supra* note 37.

48. See KEVIN MATTSON, *CREATING A DEMOCRATIC PUBLIC: THE STRUGGLE FOR URBAN PARTICIPATORY DEMOCRACY DURING THE PROGRESSIVE ERA* (1998) (detailing a set of institutional designs that were aimed to educate the public without direct influence on public policy).

49. See ELIZABETH R. GERBER, ARTHUR LUPA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* (2001) (exploring how state legislatures do not neatly implement every initiative statute passed by the public).

schemes. It also furnishes a sense of preference-intensity, something usually impossible to apprehend in traditional forms of direct democracy. Sherman Clark's *Harvard Law Review* article, *The Populist Critique of Direct Democracy*, argues that direct democracy cannot take account of how much citizens actually want something: direct democracy tells us *what most citizens* want but not *what they want most*.⁵⁰ Not so with the popular branch's more informative record, which legislators can use to garner the thoughtful input of citizens.

There would also need to be an administrative body that would be responsible for organizing the events, putting together briefing materials, and inviting politicians and experts to address the deliberators in plenary sessions. The administrative body would have political appointees and directly elected non-partisan members. There would be ways for legislatures and the people directly to get matters before the popular branch for consideration. And judges could also use the resources of the popular branch. If consulted by the judiciary in an appeal, however, the popular branch could only have recommending force.

Lest anyone think I give the popular branch too much power, there are several checks and balances I imagine in the hypothetical separation of powers I propose. First, for the popular branch to pass a law, we could institute a supermajority decision rule.⁵¹ Just as in the jury—our other populist institution—we have heightened agreement requirements, the popular branch might only be able to enact a law with substantial support. Second, any law passed by the popular branch could be vetoed by an executive or a supermajority of the legislature—and could

50. See Clark, *supra* note 24, at 456. Therefore Clark argues that direct democracy is in contrast with "representative government, [which] through a combination of legislative and electoral logrolling, allows, and in fact requires, voters to take into account the relative intensity of their various preferences in deciding how to make use of their allotment of political power." *Id.* at 467. But see Lynn A. Baker, *Preferences, Priorities, and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317, 338-39 (2004) (noting that representative lawmaking process or the election of representatives does not more accurately correlate to voters' preferences than the outcome of the plebiscite).

51. For my longer defense and analysis of supermajoritarian decision rules, see Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CON. L.Q. 141 (2006).

be subject to judicial review under a state or federal constitution.

There is also a role for political parties and interest groups. Parties would have direct access to agenda-setting by being able to send something to the popular branch for adjudication through the referendum (assuming they could garner the appropriate number of votes in the relevant houses). And they could furnish the deliberators in the popular branch with information gathered from their perspective. Interest groups could also get a matter before the popular branch through the initiative process of gathering signatures—and competing interest groups would be involved in information-gathering and furnishing experts for the deliberations. Money would still matter, of course, but it would be countered by the scrutiny of deliberation. It will be harder to confuse people when they have before them more than a misleading television commercial.

I have some more detailed ideas for the implementation of the popular branch but this outline is sufficient to demonstrate how my practical proposal draws from the theory of deliberative democracy to solve some of the central deficiencies of direct democracy.

III. SOME LEGAL APPLICATIONS

Why should this institutional design project be of interest to lawyers—aside from the connection to the jury? Speaking of his imagined republic where laws would be subjected to the deliberation of small ward-based councils, Thomas Jefferson wrote cryptically, “[b]egin them only for a single purpose; they will soon show for what others they are the best instruments.”⁵² When I began working on this project, I was interested in showing how deliberative democratic theory could be applied to an existing democracy; at that time, the theoretical literature was so self-involved that it was hard to see how the theory of deliberative democracy could be useful for those who wanted to reform political and legal institutions. To be fair, that is less and less the case these days. Various members of Columbia University’s law faculty, for example, are

52. Letter from Thomas Jefferson to Joseph C. Cabell, *available at* <http://odur.let.rug.nl/~usa/P/tj3/writings/brf/jeff241.htm>).

engaged in a movement known as “democratic experimentalism,” which draws upon deliberative democratic theory to offer reform proposals for local government problem-solving;⁵³ people in public policy schools are also on board in a movement called “participatory empowerment.”⁵⁴

A. *The Law of Direct Democracy*

There are further uses for the popular branch—of notable interest to lawyers—that can be elaborated here. One comes by way of the law surrounding direct democracy and the study of statutory interpretation in that context. For example, when litigants challenge facially neutral laws that do not on their face discriminate against a suspect class of citizens on an equal protection theory, the Supreme Court has held that the challenger must generally show the discriminatory intent of the lawmakers.⁵⁵ More specifically, when faced with the interpretation of a ballot measure, courts tend to focus on what the *voters intended when they enacted the law*, an interpretative technique known as intentionalism.⁵⁶

53. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); see also Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 SUFFOLK U. L. REV. 287, 288 n.3 (2004) (citing prominent democratic experimentalism texts); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL’Y REV. 261 (2004).

54. See, e.g., ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY (2004); Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC’Y 5 (2001).

55. See *Washington v. Davis*, 426 U.S. 229, 240-41 (1976).

56. See Schacter, *supra* note 22, at 124 (noting that statutory interpretation is dominated by intent-based approaches and the same holds true for interpretation of direct legislation); O’Hear, *supra* note 19, at 321 (arguing that when interpreting drug reform initiatives, courts seem to look more to the “hypothetical intent of ‘reasonable legislators acting reasonably’” than “the actual historical intent” of the voters). Courts frequently consider statutory intent irrespective of whether the enacting body is the legislature or the electorate. See, e.g., *State v. Gallant*, 764 P.2d 920, 922 (Or. 1988) (in determining the meaning of an ambiguous ballot measure the court tries “to discern the intent of the legislative body; in this case, the electorate.”); *In re Lance W.*, 694 P.2d 744, 754 (Cal. 1985) (“[W]hether [a law is] enacted by the Legislature or by initiative, the intent of the enacting body is the paramount

1. *Equal Protection Jurisprudence.* On the equal protection front, take *Hunter v. Erickson*,⁵⁷ a 1969 case which struck down a popularly-enacted Akron city charter amendment, held to discriminate against minorities in the housing context. Because the statute was facially “about race” without a compelling state justification, it failed to survive strict scrutiny and no resort to intent analysis was necessary.⁵⁸ But there are middle-of-the-road cases that are not clearly facially neutral or facially discriminatory, which require more subtle analysis. In 1982, in *Washington v. Seattle School District*,⁵⁹ the Court ostensibly applied *Hunter* to hold an anti-busing ordinance passed through the mechanisms of direct democracy unconstitutional, even though it was not quite clearly discriminatory on its face—and even though the Court claimed not to be engaging in intent analysis. Adhering to its 1971 decision in *James v. Valtierra*,⁶⁰ where the Court made very clear that facial

consideration.”). However, many of the “familiar problems of intentionalism writ large” are far more difficult with popular intent. Schacter, *supra* note 22, at 124-25 (noting problems of aggregating multiple individual voters intentions and of differential understanding of terms or phrases is even more pronounced with voters making the search for popular intent intractable).

Additionally, the presence of riders further confounds the search for popular intent of direct democracy because states’ single-subject rules are largely ineffective. See Lowenstein, *supra* note 23, at 961-63 (noting that the danger of riders to popular proposals will usually be worked out by the legislature and that even a strict interpretation of the single subject rule is ill-equipped to thwart the sinister effects of riders). An example from the recent proliferation of same-sex marriage bans exemplifies these difficulties. See *Perdue v. O’Kelley*, 632 S.E.2d 110 (Ga. 2006). In Georgia, 76% of the electorate approved a constitutional amendment that contained two proposals: it reserved “marriage” for opposite-sex couples and denied any civil union benefits to same-sex couples. See Brenda Goodman, *Georgia Court Upholds a Referendum Banning Same-Sex Marriage*, N.Y. TIMES, July 7, 2006, at A14. This initiative survived Georgia’s single subject rule because each proposition of the amendment was not “dissimilar and discordant” with the other, i.e., each proposition was not completely non-germane to the other. *Purdue*, 632 S.E.2d at 113. However, this interpretation of the single subject rule leaves us in a difficult situation since we do not know how many people understood and approved both parts of the proposal on which they were voting; divining the voter’s intent is a mess.

57. 393 U.S. 385 (1969).

58. *Id.* at 390-91 (holding that amendment of city charter to provide that any ordinance enacted by city council which regulates use, sale, advertisements, transfer, listing assignment, lease, sublease, or financing of realty on basis of race, color, religion, national origin, or ancestry must first be approved by majority of electors violated the Equal Protection Clause).

59. 458 U.S. 457 (1982).

neutrality presents nearly insuperable evidentiary problems because it is hard to get behind the private vote, the *Seattle School District* Court nevertheless held that the ordinance was obviously targeted against racial minorities.⁶¹ Of course, a place to see the Court engaged in intent analysis directly is *Romer v. Evans*,⁶² the 1996 Supreme Court case which struck down a popularly-enacted amendment to Colorado's Constitution, held to discriminate improperly against gays. In *Romer*, the Court plainly held that voters *had* discriminatory intent or animus in passing their ballot measure.⁶³

Because facial neutrality is becoming the routine method of sophisticated initiative and referendum drives, many courts and scholars have struggled to figure out just what sort of evidence could be probative of popular intent in the legislation of direct democracy.⁶⁴ The popular branch—with its detailed transcripts and questionnaires

60. 402 U.S. 137 (1971).

61. See *Seattle Sch. Dist.*, 458 U.S. at 484-86 (holding that selective reallocation of power from local to state level regarding busing for purposes of integration but not busing for other education purposes was clearly meant to make it more difficult to desegregate schools). The case of *Arthur v. City of Toledo*, concerning a set of referenda to disallow sewage extensions into low and moderate income housing projects challenged by the presumptive beneficiaries, also emphasizes just how difficult it is to determine discriminatory intent. 782 F.2d 565, 573 (6th Cir. 1986) (holding that a court may not inquire into possible racist motives for facially neutral referendum "unless racial discrimination was the only possible motivation behind the . . . results.").

62. 517 U.S. 620 (1996) (holding unconstitutional an amendment to Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination).

63. *Id.* at 635 (noting that the amendment did not "further a proper legislative end" but instead was intended to make homosexuals "unequal to everyone else").

64. See Schacter, *supra* note 22, at 123. Courts frequently rely on formal legal sources, such as official ballot materials, especially any ballot pamphlet required by law to be provided to voters. These "are generally used like legislative history" in interpreting ballot measures. See *id.* at 113-23. However, voters infrequently read and rely on these formal legal sources and much more frequently consult and seek guidance from informal sources such as television advertisements or media reports. See *id.* at 130-44. These informal sources are not utilized by courts in attempting to divine legislative intent. See O'Hear, *supra* note 19, at 320; see also *Kirksey v. City of Jackson*, 506 F. Supp. 491 (S.D. Miss. 1981), *aff'd* 663 F.2d 622, *reh'g denied* 669 F.2d 316, 317 (1982) (excluding admission of Gallup poll showing electorate's racialized reasons for vote on citywide referendum).

administered before and after deliberation—could provide extremely useful information for courts performing their analysis of popular intent. Moreover, the design I have recommended might address the concerns of many law professors⁶⁵ who argue that courts should exact extra-scrutiny upon laws passed directly by the citizenry. The more deliberative forum offers us more reason to treat the resulting policies with at least as much respect or deference as laws passed by our legislators.⁶⁶

2. *Statutory Interpretation.* Even if a court is facing the more mundane task of simply interpreting a statute passed through directly-democratic means and not trying to figure out whether it survives federal constitutional scrutiny, courts would have at their disposal much more information to perform their interpretative tasks and their gap-filling. For example, three-strikes-and-you're-out laws⁶⁷ and drug-sentencing reform⁶⁸ are often undertaken through the

65. See Eule, *supra* note 4, at 1559 (asserting that a “harder look” judicial review is necessary when a plebiscite could harm individual rights or undermine the equal application of the law); see also Schacter, *supra* note 22, at 159 (proposing interpretative rules to address problems in the democratic process); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 503 (1996) (proposing special canons of statutory interpretation to address deficiencies of direct democracy); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2767-68 (2005) (recommending a flexible model of statutory interpretation tailored to the type of legislation at issue).

66. Additionally, the popular branch might discourage individuals from supporting legislation that could harm racial minorities. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14-15 (1978) (arguing that the privacy of the voting booth makes “the referendum . . . a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.”). Although the popular branch would retain the secrecy of each individual's private vote and although the branch would not encourage preference-falsification, the publicity of the event might encourage open-mindedness and exact some shame on racists.

67. The first three-strikes law was passed by initiative in Washington (Initiative 593) in 1993; then California passed a similar law in 1994 (Proposition 184). See *Ewing v. California*, 538 U.S. 11, 15 (2003).

68. Medical marijuana was first legalized by initiative in 1996, and was followed two years later by successful drug reform initiatives in five other states. See BRODER, *supra* note 15, at 191-96; see also O'Hear, *supra* note 19, at 292-97 (describing the enactment of the drug treatment initiatives in Arizona and California).

initiative process. But not every statutory scheme covers every possible case. It then falls to courts to fill in statutory gaps.⁶⁹ With the deliberations of citizens being transcribed and serving as legislative history, courts will more readily be equipped to figure out, for example, if the voters wanted to allow a petty crime (like stealing a golf club) to count as the third strike⁷⁰ or whether, instead, they intended an "interests of justice" exception.

B. *Substantive Due Process*

Substantive due process is also a thicket the popular branch can bushwhack. In Justice Goldberg's concurring opinion in *Griswold*,⁷¹ he explains the predicament in which judges find themselves in substantive due process cases, where judges seek to decide whether something is a fundamental right under the Constitution: "In determining which rights are fundamental, judges [cannot] decide cases in light of their personal and private notions. Rather, they must look to the traditions and collective conscience of our people."⁷² Consider Justice Black's retort:

One may ask how [judges] can avoid considering [their personal prejudices]. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the collective conscience of our people.⁷³

I suggest that the popular branch may be just such a gadget. Justices Kennedy and Scalia could have used some informed and thoughtful *popular* input in settling the questions of history and tradition raised by *Lawrence v. Texas*⁷⁴ in 2003, which found the right to sexual privacy to

69. See O'Hear, *supra* note 19, at 302-19 (detailing how courts fill in the gaps in drug treatment initiatives).

70. See *Ewing*, 538 U.S. at 11 (upholding the defendant's twenty-five years to life sentence given as a result of his third strike, which was a conviction for felony grand theft when he stole three golf clubs).

71. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

72. *Id.* at 493 (Goldberg, J., concurring) (internal quotations omitted).

73. *Id.* at 519 (Black, J., dissenting) (internal quotations omitted).

74. 539 U.S. 558 (2003). Although Justices Kennedy and Justice Scalia appealed to a slightly different framing of the specific generality of right that

be fundamental. The popular branch would help counter the counter-majoritarian difficulty, even if judges get the final say in the judicial branch.

C. Zoning Law

There are still other applications for a popular branch in local zoning decisions. In the zoning law context, courts are a bit more circumspect about allowing for direct democracy because the decisions routinely are directed against a small class of stakeholders, rendering the adjudication much more personal and private, much more like a civil judicial proceeding.⁷⁵ Still, there is great enthusiasm on the part of cities to allow zoning decisions to be made through the mechanisms of direct democracy, perhaps because local regulators are often captured by the very interests they are supposed to regulate.⁷⁶ Maybe there would be less judicial concern if the forum were more deliberative and more like a jury's private adjudication. A small convention of the popular branch to settle such disputes may be warranted.

D. Administrative Law

There are also potential applications for the popular branch in administrative law.⁷⁷ Current designs in the

was relevant in *Lawrence*, their conclusions regarding history and tradition were nonetheless at odds with each other. Justice Kennedy claimed that "[t]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," *id.* at 568, and that "American laws targeting same-sex couples did not develop until the last third of the 20th century," *id.* at 570. By contrast, Justice Scalia claimed that homosexual sodomy is not a right "deeply rooted in our Nation's history and tradition," *id.* at 596 (Scalia, J. dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)) and that "sodomy laws were enforced against consenting adults," *id.* at 597.

75. See, e.g., *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984) (Posner, J.) (upholding a challenge to local option liquor law allowing voters in county to vote county "dry").

76. See, e.g., *Assoc. Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976).

77. See generally David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81 (2005) (applying insights of deliberative democratic theory to develop a recommendation to incentivize agencies to undertake more deliberative and participatory

process known as Regulatory Negotiation ("RegNeg"), where interest groups get together in a room with regulators to hash out compromises, are thought by many to be severely inadequate.⁷⁸ A convention of the popular branch, to which administrators and stakeholders had to justify their positions and win ratification for their rulemaking efforts, might be a way to rejuvenate and legitimate that other "fourth branch."

CONCLUSION

I cannot pursue all of these potential legal applications here in any detail; in the spirit of this Essay issue, these are mere provocations. But I hope I have made the central point of my case: deliberative democracy, once used as a theoretical orientation to undermine and critique direct democracy, can actually be used as a tool in the hands of institutional designers for bettering our practices of direct democracy. There is no doubt that they could use some

rulemaking processes). In particular, there has been a great deal of enthusiasm for the potential deliberative benefits conferred by e-rulemaking. See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (assessing the value of e-rulemaking); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 440 (2004) ("The new portals for notice and comment help make the public comment process more interactive and deliberative. This . . . increases public participation and democratic legitimacy."); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 434 (2004); Peter M. Shane, *Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, 1 INFO. SOC'Y J.L. POL'Y 147, 159 (2005), available at <http://www.is-journal.org/V01I01/I-S,%20V01-I01-P147,%20Shane.pdf> (reviewing DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003)) (arguing that administrative e-rulemaking has the potential to create a vigorous public sphere and should draw from deliberative democracy).

78. See, e.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997) (arguing that "negotiated rulemaking [establishes] . . . privately bargained interests as the source of putative public law" and "subtly subvert[s] the basic, underlying concepts of American administrative law—an agency's pursuit of the public interest through law and reasoned decisionmaking."); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1211 (1994) (noting that negotiated settlements, without involvement from interested parties, can result in a lack of democratic legitimacy).

fixing. And lawyers could also gain substantial advantages in navigating certain thorny legal problems and institutions by adopting a version of the particular solution to direct democracy's woes that I construct from the theoretical edifice of deliberative democracy.

